

1 THE HONORABLE ROBERT S. LASNIK
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL MOI, an individual,

11 Plaintiff,

12 v.

13 CHIHULY STUDIO, INC., a Washington
14 corporation; DALE CHIHULY,
15 individually and as a married person;
16 LESLIE CHIHULY, individually and as a
17 married person,

18 Defendants.

19 CHIHULY INC., a Washington
20 corporation; and DALE CHIHULY,
21 individually,

22 Counterclaim-
23 Plaintiffs,

24 v.

25 MICHAEL MOI, an individual,

26 Counterclaim-
Defendant

No. 2:17-cv-00853-RSL

REPLY IN SUPPORT OF DEFENDANTS'
AND COUNTERCLAIM PLAINTIFFS'
MOTION FOR DISQUALIFICATION OF
COUNSEL

NOTE ON MOTION CALENDAR: Friday,
July 28, 2017

ORAL ARGUMENT REQUESTED

FILED UNDER SEAL

REPLY ISO MOTION FOR DISQUALIFICATION
(No. 2:17-cv-00853-RSL)

1 The Court should disqualify Counsel from representing Mr. Moi in this action to address
2 the severe prejudice that Chihuly has suffered and will continue to suffer as a result of Counsel's
3 disregard for her [REDACTED] ethical obligations. In her over-length 20-page opposition,
4 Counsel does not dispute the material facts that compel disqualification and fails to rebut the
5 presumptions the Court may draw from those facts.

6 **First**, Counsel admits, as she must, that she previously represented and currently
7 represents [REDACTED].¹ From this fact, the Court
8 can presume that [REDACTED] had access to privileged and confidential
9 information because [REDACTED]
10 [REDACTED].² Cf. *Matter of Firestorm 1991*, 129 Wn.2d 130,
11 [REDACTED] (1996) ([REDACTED]
12 [REDACTED]
13 [REDACTED]).

14 **Second**, Counsel admits that the [REDACTED]
15 [REDACTED]. Based on these facts, the Court can also
16 presume that [REDACTED] shared Chihuly's privileged information with
17 Counsel. See *Amgen, Inc. v. Elanex Pharms., Inc.*, 160 F.R.D. 134, 141 (W.D. Wash. 1994)
18 ("Even in the absence of evidence that confidential information was shared, a court may presume
19 that confidences have been shared if the scope of representation of the former client encompasses
20 [REDACTED]

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¹ Counsel cannot seriously dispute that she represented [REDACTED] against Chihuly. Whatever the
22 financial arrangement, she acknowledges being "associated in the matter in early [REDACTED]" acting as a "media
23 consultant" and that she "represented [REDACTED] [.]" Opp. at 2 (emphasis added). If anything, it appears that her
24 involvement, dating as it apparently did to early [REDACTED], was more extensive than previously known to Chihuly. See
Supplemental Declaration of Harry H. Schneider, Jr., Ex. G (announcing Counsel's appearance as "co-counsel" in
mid-[REDACTED], on the eve of the [REDACTED]).

25 [REDACTED] See Declaration
of Michael Tobiason ("Tobiason Decl.") (Dkt. No. 24), ¶¶ 4, 6; Declaration of William C. Rava ("Rava Decl.")
26 (Dkt. No. 23), ¶ 2. [REDACTED]

[REDACTED] See Tobiason Decl. at ¶¶ 7-8; Rava Decl. ¶¶ 3-4.

1 issues raised in litigation with the current client.”).³ The Court need not make this presumption,
2 however, because Mr. Moi effectively concedes that Counsel *in fact* received privileged and
3 confidential information. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED].⁴ Mr. Moi does not deny—because he cannot
7 deny—that Counsel possesses this information.

8 **Third**, Mr. Moi does not and cannot deny that Counsel leveraged and continues to
9 leverage that information to his and her advantage and Chihuly’s disadvantage.

10 In sum, as a result of Counsel’s failure to deny or rebut these facts and the presumptions
11 that flow from them, Counsel does not even come close to carrying her burden of showing that
12 disqualification would be improper.⁵ Because Chihuly moved promptly to disqualify Counsel
13 upon Mr. Moi’s initiation of this action, and will suffer prejudice unless Counsel is disqualified,
14 Chihuly’s motion for disqualification should be granted.

15 **A. Disqualification is Warranted Under *Foss***

16 **1. Chihuly Will Be Prejudiced by Counsel’s Representation of Mr. Moi**

17 Counsel’s representation is highly prejudicial to Chihuly. Under *Foss*, the inquiry “turns
18 on the significance and materiality of the privileged information to the underlying litigation.”
19 *Foss Mar. Co. v. Brandewiede*, 190 Wn. App. 186, 195 (2015). Counsel repeatedly asserts that
20 information received from [REDACTED] cannot prejudice Chihuly because it
21 does not relate to Mr. Moi himself and is therefore not material. *See, e.g.*, Opp. at 10. That

22 ³ See also *United States v. SAE Civil Const.*, 1996 WL 148521, at [REDACTED] (D. Neb. Jan. 29, 1996) [REDACTED]

23 [REDACTED]
24 ⁴ [REDACTED] . [REDACTED] *See Mot.* at 9 n.7; *see also* Tobiason Decl. ¶ 9 ([REDACTED]).

25 ⁵ The burden on this issue belongs with Counsel. The non-binding authority Counsel relies on to argue
otherwise should be disregarded because, in this Court, “[t]he burden of proof rests with the firm whose
disqualification is sought.” *Atl. Specialty Ins. Co. v. Premera Blue Cross*, 2016 WL 1615430, at *9 (W.D. Wash.
Apr. 22, 2016); *see also Amgen*, 160 F.R.D. at 139-40.

1 argument is nonsense. Mr. Moi alleges that he created art with Dale between 1999 and 2014.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] Counsel would not have

8 access to this information unless she represented [REDACTED]. Courts

9 routinely disqualify counsel who receive privileged and confidential information [REDACTED]

10 [REDACTED] because of the unfair prejudice caused by counsel's possession of that information.

11 See Mot. at 5 n.4.⁶ This case should be no different.

12 **2. Counsel's Conduct Is Wrongful**

13 Mr. Moi also failed to carry his burden on the second *Foss* factor—" [t]he level of fault or
14 misconduct by counsel[.]" See *Foss*, 190 Wn. App. at 196. One of Chihuly's central concerns is
15 Counsel's use of privileged and confidential information obtained through her representation of

16 [REDACTED] for Mr. Moi's and her benefit. For example, [REDACTED]

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19 ⁶ Counsel attempts to distinguish Chihuly's cases by claiming that in each "the disqualified attorney
20 received [REDACTED] that had unique information or knowledge about the legal or factual
21 preparation of the *actual case at issue*." See Opp. at 10. But, as discussed above, Counsel possesses information
22 about the actual case at issue. Indeed, the cases Chihuly cited turn on whether the party moving for disqualification
23 would be unfairly prejudiced by opposing counsel's possession of relevant privileged and confidential information.
24 See, e.g., *Cargill Inc. v. Budine*, 2007 WL 1813762, at *12 (E.D. Cal. June 22, 2007) ("Where it can be reasonably
25 said that in the course of the former representation the attorney might have acquired information related to the
subject matter of his subsequent representation, it is the court's duty to order the attorney disqualified."); *Packard
Bell NEC, Inc. v. Aztech Sys. Ltd.*, 2001 WL 880957, at *9 (C.D. Cal. Jan. 22, 2001) ("[D]isqualification is proper
where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has
obtained information the court believes would likely be used advantageously against an adverse party during the
course of the litigation."); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, [REDACTED] (D.
Conn. 1991) [REDACTED]

26 [REDACTED]; see also *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037, 1046 (W.D. Mo. 1984). Counsel should be disqualified because the same is true here.

1 [REDACTED]
2 [REDACTED] [REDACTED]
3 [REDACTED]
4 [REDACTED] *See id.* [REDACTED]

5 [REDACTED] This conduct is wrongful and
6 evinces Counsel's willingness to exploit Chihuly's privileged and confidential information for
7 her and Mr. Moi's advantage.⁹ The second factor weighs in favor of disqualification.

8 **3. There is No Waiver**

9 Counsel's half-hearted waiver argument is baseless. Counsel admits, as she must, that
10 she has privileged and confidential information including [REDACTED]

11 [REDACTED]. *See Opp.* at 3 ([REDACTED]
12 [REDACTED]), 14 ([REDACTED]
13 [REDACTED]); Declaration of Anne Bremner (Dkt. No. 41), ¶ 6.¹⁰ She argues Chihuly
14 should have raised these objections during her representation of [REDACTED]. *Opp.* at 14-15.
15 But as counsel notes, she may have been entitled to obtain that information in the course of her
16

17 ⁷ Counsel's contention that Chihuly [REDACTED]

18 ⁸ Counsel's assertion that [REDACTED]

20 [REDACTED] *See Declaration of Harry H. Schneider, Jr. ("Schneider Decl.")* (Dkt. No. 22),
21 Exs. A-B, E. Additionally, Counsel's claim that [REDACTED]

22 [REDACTED]. *State ex rel. Verizon W. Virginia, Inc. v. Matish*, 740 S.E.2d 84,
23 (W. Va. 2013) (emphasis added). Chihuly is not arguing that [REDACTED]
24 [REDACTED]. Instead, it is Counsel's possession of privileged information and her blatant and highly prejudicial use of
Chihuly's privileged and confidential information that precludes her from representing Mr. Moi.

Assuming it would be proper to consider the Lachman Declaration—it would not be, given that it is a
legal opinion masquerading as an expert declaration—his opinion is merely that Counsel did nothing wrong in
receiving confidential and privileged information. Importantly, Mr. Lachman does not opine that Counsel's use of
the information she gained from representing [REDACTED] would be proper.

¹⁰ This knowledge shows that the third *Foss* factor also weighs in Chihuly's favor. *See Foss*, 190 Wn. App.
at 196.

1 prior representation. But here, *in this lawsuit*, the issue is that her access to privileged and
2 confidential information gained *through prior representations* prejudices Chihuly. Chihuly's
3 motion on that issue is timely because it was made as soon as Chihuly became aware of
4 Counsel's use of privileged and confidential information to advance Mr. Moi's claims and [REDACTED]
5 [REDACTED], and before any significant litigation activities have commenced. *See*
6 Schneider Decl., Exs. C, D.

7 **4. Disqualification Is the Least Severe Sanction**

8 Disqualification is the least severe sanction. This is not, as Counsel suggests, about "an
9 attorney's mere access to an opposing party's privileged information[.]" *See* Opp. at 15 (citing
10 *Foss*, 190 Wn. App. at 198). Rather, Counsel not only admits that she possesses confidential and
11 privileged information material to Mr. Moi's claims but has also demonstrated her willingness to
12 leverage that information to her and her client's advantage—in blatant disregard of her
13 professional and ethical obligations [REDACTED]. Counsel's actions have already
14 tainted these proceedings, and will only continue to do so. Nothing short of disqualifying
15 Counsel will ensure the integrity of the judicial process.

16 **B. Counsel Should Be Disqualified Based On Conflicts Of Interest**

17 Counsel's representation of Mr. Moi presents conflicts of interest that warrant
18 disqualification. Counsel cannot take on any representation that is "materially adverse" to—or
19 "materially limited by"—[REDACTED], or "reveal information
20 relating to the representation" of those former clients. *See* RPC 1.7(a); RPC 1.9(a), (c).
21 Counsel's contention that her obligations to [REDACTED] are not in conflict
22 with Mr. Moi's interests and that she can ethically depose [REDACTED] does
23 not conform to reality. Counsel could not use information from one client to attempt to discredit
24 testimony from another, and cannot even risk placing herself in a situation requiring her to
25 choose between her duty to represent Mr. Moi zealously and her obligation to keep [REDACTED]
[REDACTED], for example. *See, e.g.*, *FMC Techs. Inc. v. Edwards*, 420 F. Supp.
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1 2d 1153, 1160-61 (W.D. Wash. 2006) (disqualifying counsel under RPC 1.9 where counsel was
2 required to cross-examine former client using potentially privileged information from prior
3 representation to prove former client was lying). And, while Counsel also claims she can safely
4 navigate [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]. RPCs 1.7 and 1.9 are designed to avoid these types of conflicts, and, in this case, those
8 rules provide additional grounds for disqualifying Counsel.

9 **C. There is No Need For An Evidentiary Hearing**

10 An evidentiary hearing is unnecessary and would only serve to further risk inappropriate
11 misconduct. The touchstone factual issues—whether Counsel has and has used privileged and
12 confidential Chihuly information—are not in dispute. *See Knight v. Browne*, 2007 WL 1847245,
13 at *3 (W.D. Wash. June 27, 2007) (“[T]he parties do not dispute any relevant facts, and thus no
14 evidentiary hearing is warranted [in the preliminary injunction context].”); *see also Suchite v.*
15 *Kleppin*, 784 F. Supp. 2d 1343, 1345 n.1 (S.D. Fla. 2011) (“An evidentiary hearing is not
16 necessary for a motion to disqualify counsel where there are no disputed issues of material fact.”).
17 Counsel quibbles only with non-material issues that are at most disagreements of a purely legal
18 nature. Her request for an evidentiary hearing should be denied, but to the extent that the Court
19 should consider such an option, the parties should confer on mutual discovery.

20 **II. CONCLUSION**

21 For the reasons set forth above and in the motion, Chihuly’s motion should be granted.
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2 DATED: July 28, 2017

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CERTIFICATE OF SERVICE

I certify that on July 28, 2017, I served the foregoing on the following attorney(s) of record of record by the method(s) indicated:

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I certify under penalty of perjury that the foregoing is true and correct.

DATED this 28th day of July, 2017.

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